



IN THE
Supreme Court of the United States

January Term, 1977

No. **76-1074**

BENNETT DICKERSON

Petitioner

vs

CERMEL-LUFT INSURANCE AGENCY, INC.

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT**

LYMAN, SCURRY and WINKFIELD

ATTORNEYS AT LAW

SUITE 222

720 EAST BROAD STREET

COLUMBUS, OHIO 43215

TELEPHONE A.C. (614) 221-1158

BY: WEBSTER S. LYMAN, OF COUNSEL

Attorney for Petitioner

IN THE
Supreme Court of the United States
JANUARY TERM 1977

BENNETT DICKERSON
Petitioner

vs

CERMEL-LUFT INSURANCE AGENCY, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO
OHIO SUPREME COURT

TO: The Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States
of America.

The petition of Bennett Dickerson for a writ of certiorari to review a judgment of the Supreme Court of Ohio made and entered by said Court on the 8th day of October 1976, a copy of which is included in the Appendix herein, respectfully shows to this honorable Court:

I. Opinions of the Lower Courts

a) The trial Court, Franklin County Municipal Court of Columbus, Ohio, rendered its decision against petitioner on August 20, 1975. A copy of said opinion may be found in the Appendix infra.

b) The opinion of the Court of Appeals of Franklin County, Ohio, dated May 13, 1976, affirming the decision of the lower Court, is a part of the Appendix herein.

c) The opinion of the Supreme Court of Ohio has

not been reported officially or unofficially. Nor were any other opinions of the Courts below reported.

II. Statement of the Grounds on which the Jurisdiction of This Court is Invoked

The date of the judgment sought to be reviewed and the date of its entry are the 8th day of October 1976.

There was no order respecting a rehearing and there was no order granting an extension of time within which to petition for certiorari.

This case is submitted to the Court for review under the provisions of 28 U.S. Code Section 1257 (3) which permits reviewing of cases in this category by this Court by writ of certiorari.

III. Questions Presented for Review

Whether or not the trial Court abused its discretion in failing to grant petitioner's request for a continuance on the date of the trial to obtain counsel in a case less than five months old in which no prior continuance had been sought or granted.

Whether or not said refusal violated the Due Process clause and Equal Protection of the Laws provisions of the Constitution of the United States.

IV. Constitutional Provisions which the Case Involves

Fourteenth Amendment to the Constitution of the United States reads, in part:

"Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"

V. Statement of the Case

Respondent filed suit against petitioner upon an account in the Franklin County Municipal Court of Columbus, Ohio on the 25th day of April 1975. Petitioner, personally and without counsel, filed an answer denying liability on May 8, 1975.

The case, in the due course of assignments, was set for trial on August 20, 1975. When petitioner appeared for the trial he saw respondent with counsel and, realizing the disadvantage to defend without counsel, he requested a continuance to obtain counsel. The request was denied by the trial judge and the parties were ordered to proceed with the trial. Petitioner refused to proceed and departed from the Court. Thereafter respondent obtained a judgment as prayed for in its complaint in the absence of petitioner.

Petitioner filed an appeal in the Court of Appeals of Franklin County, Ohio. Said Court affirmed the decision of the trial Court on May 13, 1976.

Petitioner then filed an appeal in the Supreme Court of Ohio which was dismissed by said Court on October 8, 1976. From which ruling, petitioner now prosecutes this action for relief.

VI. Stage in the Proceedings in the Court of First Instance and in the Appellate Court, at which, and the Manner in which, the Federal Questions Sought to be Reviewed were Raised

The federal question of the denial of a continuance for petitioner to obtain counsel for petitioner in a motion to vacate the default judgment filed September 30, 1975 and is as follows:

**IN THE MUNICIPAL COURT
OF FRANKLIN COUNTY, OHIO**

CERMEL J. LUFT INSURANCE AGENCY INC.

Plaintiff

vs.

Case Number: 414167

Filed 1975 Sept. 30 PM 2:03

BENNETT DICKERSON

Defendant

MOTION TO VACATE DEFAULT JUDGMENT

Now comes the defendant, Bennett Dickerson, and moves the Court to vacate and set aside the judgment rendered herein by default against the defendant on August 20, 1975 for the following reasons to-wit:

1. The Court abused its discretion in overruling defendant's motion for a continuance in order to obtain counsel.
2. The decision of the Court is contrary to law and is against the weight of the evidence.

3. Defendant was never notified by mail of the decision of the Court in this matter.

WEBSTER S. LYMAN

Attorney for Defendant

825 East Long street

Columbus, Ohio 43203

Telephone: A.C. 614/253-2774

Said motion was duly overruled by another Judge of the said lower Court on December 18, 1975. The ruling of said Court is as follows:

The motion to vacate the judgment rendered by J. Donnally is overruled and denied. Judgment to stand.

The violations of petitioner's constitutional rights were raised in the Franklin County Court of Appeals in the assignments of error filed therein on March 2, 1976. The assignments of error are attached hereto on the next page.

VII. Argument Amplifying Reasons for Allowing Writ

The right to be represented by Counsel in all tribunals of justice is guaranteed under the due process provisions of the Fourteenth Amendment.

In Powell v. Alabama, (1932) 287 U.S. 45, 77 L. Ed. 158 the Court held that failure to give reasonable time to a defendant to secure counsel before proceeding to trial violates the due process clause of the Fourteenth Amend-

ment. See also: *Cooke v. U.S.* (1925) 267 U.S. 517, 69 L. Ed. 767 and *Chandler v. Fretag* (1954) 348 U.S. 3.

Thus in the instant case a request for a brief postponement of a case less than five months old for the purpose of protecting constitutional rights was not unreasonable.

In *Painter v. Texas* (1965) 380 U.S. 400, 13 L. Ed. 2d 923 this Court held that a defendant is entitled to counsel at all stages of the proceedings to satisfy the due process requirements. See also: *Gideon v. Wainwright*, 372 U.S. 335 and *In Re Gault*, 387 U.S. 1.

This right to counsel is as important in protecting property rights as it is in protecting life and liberty.

In *Fessenden v. Fessenden*, 32 O. App. 16 the Court of Appeals of Ohio upheld the rights of a civil litigant to be represented by counsel. See also: *Schetel v. Weitz*, 40 O. App. 2d 95.

The Ohio Supreme Court in *N.Y. Central Rd. Co. v. PUCO*, 157 O.S. 257 stated that Due Process requires a reasonable right to be heard to parties affected by any action adverse to them. See also: *Hatch Etrax v. Tipton*, 131 O.S. 364 and *Long & A. Co. v. Willis*, 47 N.E. 2d 414.

Furthermore, the request for a continuance was not unreasonable. Many cases are postponed on the date of trial for many reasons such as: illness of a party or counsel, unavailability of key witnesses, counsel engaged in another court, Judge occupied in another trial, trial preference to an older case assigned for same trial date, etc. . . . None of these reasons for postponements are more serious or important than the request made herein.

ASSIGNMENTS OF ERROR

Assignment of Error Number One

The Trial Court Erred In Rejecting Defendant's Request For A Continuance To Obtain Counsel.

Defendant was at a marked disadvantage in representing himself before the Court without legal assistance. He was deprived his constitutional right to have Counsel.

Assignment of Error Number Two

The Trial Court Erred in Proceeding To Trial Without Defendant.

By this action defendant was prevented from having a fair and impartial trial. The Court abused its discretion in so acting.

Assignment of Error Number Three

The Trial Court Erred In Overruling Defendant's Motion To Vacate The Default Judgment.

It was unusual and irregular for another judge to rule upon a motion in a case decided by the trial judge.

The following is a decision of the Judge of the Franklin County Municipal Court as recorded on the "Half sheet" of the Court file: 12/18/75. Judge: REDA.

CERNEL J. LUFT INSURANCE AGENCY INC.

Plaintiff

vs.

BENNETT DICKERSON

Defendant

Webster Lyman
825 E. Long St.
Columbus, Ohio 43203

The motion to vacate the judgment rendered by J. Donnally is overruled and denied. Judgment to stand.

We believe that the question raised herein is of such magnitude and importance as to warrant a final determination by the highest Court of the land.

WHEREFORE, petitioner prays that a Writ of Certiorari may issue from this Court so that the decision of the lower Courts may be reviewed and reversed by this Honorable Court.

LYMAN, SCURRY AND WINKFIELD

BY: Webster S. Lyman

Attorney for Petitioner

720 East Broad Street

Suite 222

Columbus, Ohio 43215

Telephone: AC 614/221-1158

Proof of Service

I hereby certify that I served a copy of the above and foregoing petition for a writ of certiorari upon Ronald P. Kauffman, attorney for respondent, at 21 East State Street, Columbus, Ohio, on the 6th day of January, 1977 by ordinary United States mail.

Webster S. Lyman
Attorney for Petitioner

Appendix 1

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

“ nor shall any State deprive any person of

life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

OHIO CONSTITUTION

Article One, Section 10

“ In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel, ”

Article One, Section 16

“All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”

Appendix 2

IN THE MUNICIPAL COURT OF FRANKLIN COUNTY, OHIO

CERNEL J. LUFT INSURANCE AGENCY INC.

Plaintiff

vs.

BENNETT DICKERSON

Defendant

J U D G M E N T

(Half Sheet) 8-20-75

Case called. Parties present. Defendant present without counsel. Defendant's motion for continuance to em-

Default judgment rendered for plaintiff for sum prayed for, upon proof by sworn testimony, in the sum of \$2169.00 and costs.

Appendix 3
IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

DECISION

MR. RONALD P. KAUFFMAN,
21 East State Street,
Columbus, Ohio,
For Plaintiff-Appellee.

MR. WEBSTER S. LYMAN,
825 East Long Street,
Columbus, Ohio 43203,
For Defendant-Appellant.

No. 76AP-8

Appellee, insurance agency, filed a complaint in the Franklin County Municipal Court on April 25, 1975, alleging that appellant owed \$2,169.00 on an account for unpaid premiums for insurance. Service upon appellant indicated the name and address of plaintiff's attorney. Appellant answered, denying the allegations of the complaint, serving a copy thereof upon counsel for appellee. A request for assignment and certificate of readiness was filed on June 12, 1975, by appellee's counsel and a copy was served upon appellant. The case was set for trial on August 20, 1975, at which time appellant appeared without counsel and appellee appeared with counsel. At that time appellant, who had served his own answer, and otherwise represented himself, moved for a continuance to employ counsel. That motion was denied and appellant refused to proceed and left the courtroom. Default judgment was rendered for appellee for the sum prayed for upon proof by sworn testimony.

On September 30, 1975, a motion to vacate judgment was filed by an attorney retained by appellant. Upon the briefs of the parties and an affidavit of appellant that he left the courtroom when the court would not grant him a continuance to obtain counsel, the motion to vacate judgment was overruled by the trial court. The motion was heard by a judge other than the judge who granted default judgment, as that judge was a retired judge not regularly serving in the court.

Appellant raises the following assignments of error in his appeal from the refusal of the trial court to vacate the judgment:

“(1) The trial court erred in rejecting defendant’s request for a continuance to obtain counsel.

"(2) The trial court erred in proceeding to trial without defendant.

"(3) The trial court erred in overruling defendant's motion to vacate the default judgment."

The first two assignments of error are combined for discussion as they both involve the determination of whether the trial court abused its discretion in refusing to grant a continuance and in rendering a default judgment when appellant voluntarily left the courtroom.

Appellant contends that when he saw plaintiff with an attorney at the trial he realized the unfair position this placed him in and then requested the court for a postponement to obtain an attorney. That position should have been no surprise to him. From the inception of the law suit, appellant knew that plaintiff had obtained the services of an attorney. Appellant had ample opportunity to obtain an attorney prior to the day of the trial. The decision as to granting a continuance in order to permit appellant time to obtain counsel was within the discretion of the trial court. The trial court's action was not arbitrary and capricious, but was a proper determination within its discretion.

Moreover, there is no right, constitutional or otherwise, to a continuance on the day scheduled for trial to obtain counsel, after voluntarily proceeding without counsel until that time. In addition, there is no record of the trial court proceeding, other than the indication in the judgment entry that the judgment was granted upon sworn testimony. Appellant has not demonstrated that lack of counsel has prejudiced him.

Assignment of error numbers one and two are overruled.

The third assignment of error complains of the fact that the trial court ruling was by a judge other than the judge who decided the motion to vacate judgment. Civ. R. 63 (B) permits another judge, designated by the administrative judge, to perform the duties to be performed by the court after a verdict is returned if, for any reason, the judge before whom an action has been tried is unable to perform these duties. It is a matter of record that the judge who heard the trial and overruled the motion for continuance is not a regular judge of the court, but a retired judge assigned periodically to the court. Under those conditions there is no error in assigning another judge to perform after-verdict duties or to rule on the motion at hand if such other judge is satisfied that he can perform these duties.

In addition, there is nothing in the record to substantiate relief from judgment under Civ. R. 60 (B), nor does the affidavit submitted by appellant, even if taken as true, support relief from judgment. Assignment of error number three is overruled.

Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

WHITESIDE and REILLY, JJ., concur.

Appendix 4 IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

CERMEL-LUFT INSURANCE AGENCY, INC.	:
<i>Plaintiff-Appellee,</i>	:
v.	:
BENNETT DICKERSON,	:
<i>Defendant-Appellant.</i>	:

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on May 13, 1976, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed.

WHITESIDE, REILLY and McCORMAC, JJ.

By Judge John W. McCormac

cc: Ronald P. Kauffman

Webster S. Lyman

Appendix 5

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

CERMEL-LUFT INSURANCE AGENCY, INC.

Appellee,

1976 Term

To wit: October 8, 1976

vs.

BENNETT, DICKERSON,

Appellant

No. 76-831

APPEAL FROM THE COURT OF APPEALS

for Franklin County

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner

prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this _____ day of _____ 19 ____

Clerk

Deputy

Appendix 6

THE SUPREME COURT OF OHIO

TO CERTIFY ITS RECORD

THE STATE OF OHIO, CITY OF COLUMBUS

CERMEL-LUFT INSURANCE AGENCY, INC.

Appellee

vs.

BENNETT DICKERSON,

Appellant

1976 Term

To wit: October 8, 1976

No. 76-831

**MOTION FOR AN ORDER DIRECTING THE
COURT OF APPEALS for Franklin County
TO CERTIFY ITS RECORD**

It is ordered by the Court that this motion is overruled.
COSTS:

Motion Fee, \$20.00, paid by Webster S. Lyman

I, Thomas L. Startzman, Clerk of the Supreme Court
of Ohio, certify that the foregoing entry was correctly
copied from the Journal of this Court.

Witness my hand and seal of the Court
this _____ day of _____ 19 ____

Clerk

Deputy